

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAN M. GRISSINGER,	:	CIVIL ACTION
Executrix of the Estate	:	
of Dorothea G. Masishin	:	
	:	
v.	:	
	:	
WESLEY YOUNG, M.D.	:	
and	:	
JOHN DOE and JANE DOE	:	
	:	NO. 98-1710

MEMORANDUM and ORDER

Norma L. Shapiro, J.

June 30, 1998

The plaintiff, Jan M. Grissinger, Executrix of the Estate of Dorothea G. Masishin (hereinafter "Decedent"), alleges defendant, Wesley Young, M.D. (hereinafter "Young"), negligently failed to diagnose the cancer that resulted in the death of the decedent. The plaintiff has also named as defendants, John Doe and Jane Doe, unidentified physicians, medical assistants, nurses, laboratory technicians and/or employees of the defendant. Defendant Young has filed a motion to dismiss for improper venue pursuant to Federal Rule of Civil Procedure 12(b)(3) or, alternatively, under 28 U.S.C. § 1406, transfer the action to the District of Delaware. Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant Young's motion requests dismissal of the claims against John Doe and Jane Doe and for punitive damages. Plaintiff's answer asserts that a dismissal should not

be granted because discovery is needed to obtain information regarding venue. For the reasons stated below defendant Young's motion to transfer will be granted. Defendant Young's 12(b)(6) motion should be considered by the transferee court.

BACKGROUND

In January, 1995, decedent visited Dr. Young at his Newark, Delaware medical office. (Compl. ¶ 7). Decedent complained of chest pain, coughing, shortness of breath, decreased appetite, and weight loss; defendant diagnosed the condition as emphysema. (Id. ¶¶ 7, 8). Plaintiff alleges defendants were negligent and careless in diagnosing and treating decedent. (Id. ¶ 8). Plaintiff avers decedent was actually suffering from lung cancer and defendants failed to perform tests to confirm the diagnosis of emphysema. (Id. ¶¶ 8, 9). Defendant Young treated decedent for approximately one year without any diagnostic testing. (Id. ¶ 10). Decedent was later diagnosed with the severe and disabling malignancies of the lung and brain that led to her death. (Id. ¶ 11). Plaintiff filed survival and wrongful death actions alleging decedent's death was a direct result of defendants' negligence.

DISCUSSION

Plaintiff, and presumably plaintiff's decedent, are and were citizens of Pennsylvania; defendant Young is a citizen of Delaware. (Compl. ¶¶ 4, 5). Jurisdiction is based solely on

diversity (28 U.S.C. § 1332(a)(1)(1998)), so the applicable statutory provision as to venue is 28 U.S.C. § 1391(a)¹:

A civil action founded only on diversity of citizenship may . . . be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.
28 U.S.C. § 1391(a) (1998).

The plaintiff's original choice of forum fails to satisfy the above criteria. Section 1391(a)(1) permits this action in a judicial district where any defendant resides if all defendants reside in the same state. Defendant Young does not reside in the Commonwealth and the residence of the unidentified defendants is not known. (Def. Mot. to Dismiss at 3).

Under 28 U.S.C. § 1391(a)(2), venue lies in the district where a substantial part of the events or omissions giving rise to the claim occur. Defendant Young states the alleged incident and medical treatment giving rise to this cause of action occurred at his medical office in Newark, Delaware. (Def. Mot.

¹ Dr. Young's Counsel erroneously cited 28 U.S.C. § 1391(b) in defendant's motion to dismiss for lack of venue. 28 U.S.C. § 1391(b) provides that "a civil action wherein jurisdiction is not founded solely on diversity of citizenship may . . . otherwise be brought." This section is not applicable because the sole basis for jurisdiction is diversity.

to Dismiss ¶ 5). The plaintiff alleged a substantial part of the events or omissions giving rise to this action transpired in the Eastern District of Pennsylvania, (Compl. ¶ 3), but concedes in her response to the motion that she is unable to ascertain what acts or omissions occurred in the Commonwealth². (Pl. Response at 3). The plaintiff avers discovery is necessary to ascertain whether acts or omission occurred in the Commonwealth or Delaware. (Pl. Response at 4). But the plaintiff already knows where the actionable events or omissions occurred. Defendant Young's misdiagnosis and failure to treat occurred in his Delaware office where he treats (or allegedly mistreats). Defendant Young is not licensed to practice in Pennsylvania. (Compl. ¶ 5). Decedent's subsequent cancer diagnosis at Fox Chase Center in Pennsylvania was by other non-defendant physicians.

Under § 1391(a)(3), an action may be brought in a jurisdiction in which the defendant is subject to personal jurisdiction, if there is no other district in which it may be brought. This section does not apply; this action could have been brought in the District of Delaware where venue lies and defendant Young is subject to personal jurisdiction.

² Plaintiff's response concedes "Defendant is further correct that the complaint sets forth no information which would tie Defendant to the Commonwealth of Pennsylvania." (Pl. Response at 3).

The burden of proving improper venue "should ordinarily" be on the defendant. Myers v. American Dental Association, 695 F.2d 716, 724-25 (3d Cir. 1982). Specifically, a defendant "moving to dismiss under 28 U.S.C. § 1406 bears the burden of establishing affirmatively that venue is improper." Born v. Iannacone, No. 97-5607, 1998 WL 297621 *3 (E.D. Pa. June 3, 1998) (citing Myers, 695 F.2d at 724); see also, Reitnour v. Cochran, No. 86-4869, 1987 WL 9774 *FN1 (E.D. Pa. April 22, 1987) (concluding the burden of proof in a motion to transfer for improper venue is on the defendant). It is undisputed that defendant Young's medical office is located in Delaware; the alleged failure to treat giving rise to the cause of action occurred at that office. (Def. Mot. to Dismiss ¶ 5). A substantial number of the events or omissions occurred at that location. Defendant Young has met his burden; under 28 U.S.C. § 1391(a)(2), venue lies in the District of Delaware, not in the Eastern District of Pennsylvania.

The United States Code provides when venue is improper the court may dismiss the action, or in the alternative transfer it to a district in which the action could have been brought. 28 U.S.C. § 1406(a) (1998). The court may, at its discretion, transfer the action, rather than dismiss, to better serve the "interests of justice." See Goldlawr, Inc. v. Shubert, 369 U.S. 463 (1962); Dubin v. United States, 380 F.2d 813, 816 (5th Cir.

1967); Melahn v. Dimensional Oilfield Services, Inc., 747 F.Supp. 1206, 1207 (M.D. La. 1990); Johnson v. Helicopter & Airplane Services Corp., 389 F.Supp. 509, 523 (D.C. Md. 1974). Plaintiff asserts that at the time of filing, the Statute of Limitations was about to toll. (Pl. Resp. at 3). If the action were dismissed, the plaintiff might be precluded from seeking any relief for defendants' alleged negligence. It is in the "interests of justice" that the action be transferred, not dismissed.

28 U.S.C. § 1406 permits transfer only to a district in which the action could have been brought. 28 U.S.C. § 1406(a); see also New Generation Foods, Inc. v. Spicer's International, Common Trust, 669 F.Supp. 599, 601-02 (S.D.N.Y. 1987). The action could have been brought in the District of Delaware because subject matter jurisdiction is based on diversity, defendant Young is subject to personal jurisdiction in Delaware, and a substantial number of the events or omissions occurred in Delaware. 28 U.S.C. § 1391(a)(2).

Defendant Young interposed a "timely and sufficient" objection to the original venue. See 28 U.S.C. § 1406(b) ("Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to venue"); see also, Manley v. Engram, 755 F.2d 1463, 1467 (11th Cir. 1985). The

court will transfer the claim to the District of Delaware and allow the transferee court to decide the pending motion under Federal Rule of Civil Procedure 12(b)(6).

CONCLUSION

Defendant Young's motion to transfer for improper venue will be granted. Venue in this diversity action does not lie in this district. See 28 U.S.C. § 1391(a). Pursuant to 28 U.S.C. § 1406, the court will exercise its discretion to transfer the action to the District of Delaware, where the action could have been brought. Defendant Young's motion under Federal Rule of Civil Procedure 12(b)(3) will be granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAN M. GRISSINGER,	:	CIVIL ACTION
Executrix of the Estate	:	
of Dorothea G. Masishin	:	
	:	
v.	:	
	:	
WESLEY YOUNG, M.D.	:	
and	:	
JOHN DOE and JANE DOE	:	
	:	NO. 98-1710

ORDER

AND NOW, this 30th Day of June, 1998, upon defendant's motion to dismiss plaintiff Jan M. Grissinger's ("Grissinger") Complaint, Grissinger's Response thereto, and in accordance with the attached memorandum, it is hereby **ORDERED** that:

1. Pursuant to 28 U.S.C. § 1406, Defendant's Wesley Young, M.D., Motion to Transfer is **GRANTED**. The action is hereby transferred to the District of Delaware, where it could have been brought.

2. The clerk shall transfer the case forthwith.

J.